LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 21 1973
MICHAEL RODAK, JR., CLERK

No. 72-1694

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE STATE OF NEW YORK, PETITIONER

v.

ROBERT NEWMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

KEITH A. JONES
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1694

THE STATE OF NEW YORK, PETITIONER

v.

ROBERT NEWMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the views of the United States.

QUESTION PRESENTED

Whether the Drug Abuse Office and Treatment Act of 1972 revoked the authority granted to the Attorney General and the Secretary of Health, Education, and Welfare by the Comprehensive Drug Abuse Prevention and Control Act of 1970 to authorize the directors of drug research programs to withhold the names or other identifying characteristics of individuals participating in such programs.

STATEMENT

1. This case involves the interrelationship of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, and the Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, 86

Stat. 65, as they apply to the confidentiality of the names and identifying characteristics of individuals participating as patients in methadone maintenance treatment programs. Such programs involve research into the safety and effectiveness of methadone and may only be conducted with the approval of the Attorney General or the Secretary of Health, Education, and Welfare. See 21 U.S.C. 355(i) and 872; 21 C.F.R. 130.44.

Prior to 1970, there were no federal restrictions on the release of patient records by persons conducting research into the safety and effectiveness of methadone. Under federal law, a program director could voluntarily release patient records for use in criminal investigations or other purposes. Moreover, such records were subject to legal process.

The susceptibility of patient records to legal process hampered the conduct of methadone maintenance treatment programs; individuals were deterred from participating as patients by the knowledge that program records might be used in a criminal investigation into illicit drug-related activities. See H. Rep. No. 91-1444, 91st Cong., 2d Sess., Part 1, p. 28. To remedy this problem, Congress, in enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, granted both the Attorney General and the Secretary authority to authorize methadone maintenance treatment program directors, and other persons engaged in research on the use and effect of drugs, to withhold the names and other identifying characteristics of the individuals participating as patients in their programs. See 21 U.S.C. 872(c) and 42 U.S.C. 242a(a). Persons so authorized by the Attorney General or the Secretary "may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other

proceeding to identify the subjects of research for which such authorization was obtained." *Ibid.* Thus under the 1970 Act, a methadone maintenance treatment program director retained discretion voluntarily to release patient records, but, upon authorization by the Attorney General or the Secretary, he may refuse disclosure if he chooses to do so.

In 1972, the Secretary, acting through the Commissioner of Food and Drugs, adopted regulations implementing his authority to authorize nondisclosure under the 1970 Act:

> * * * in accordance with the authority conferred by [42 U.S.C. 242a(a)], every program is hereby further authorized to protect the privacy of patients therein by withholding from all persons not employed by such program or otherwise connected with the conduct of its operations the names or other identifying characteristics of such patients under any circumstances under which such program has reasonable grounds to believe that such information may be used to conduct any criminal investigation or prosecution of a patient. Programs may not be compelled in any Federal, State, or local civil, criminal, administrative, or other proceedings to furnish such information * * *. [21 C.F.R. 130.44(g).]

Also in 1972, Congress further acted to ensure the confidentiality of patient records by significantly restricting the circumstances under which program directors could voluntarily release such records. Section 408 of the Drug Abuse Office and Treatment Act of 1972, 86 Stat. 79, 21 U.S.C. (1970 ed., Supp. II) 1175, provides that patient records "shall be confidential and may be disclosed [to persons other than physicians or other persons connected with the program] only * * * [i]f [disclosure is] authorized by an appropriate order of a

court of competent jurisdiction granted after application showing good cause therefor." Thus under the 1972 Act, a program director may not release patient records for use in a criminal investigation unless he is specifically authorized to do so by a court.

2. Respondent is the Director of the New York City Methadone Maintenance Treatment Program. On June 30, 1972, respondent was served with a state grand jury subpoena to produce photographs of patients in his program. The subpoena was issued in connection with a criminal investigation into a murder committed in New York City; the photographs were sought because a witness to the crime believed that she had previously seen the killer being treated as a patient in respondent's program. Respondent moved to quash the subpoena in the state trial court, and that motion was denied (Pet. App. C). Respondent subsequently refused to obey the trial court's order to comply with the subpoena, and he was adjudged in contempt and sentenced to 30 days in jail.[1] Respondent's conviction was affirmed by the state intermediate appellate court (Pet. App. B).[2]

Shortly after the decision of the intermediate appellate court the Attorney General, pursuant to his authority

---

[1]The trial court's order was stayed pending appeal, and respondent was never required to serve any part of his sentence.

[2]The intermediate appellate court modified the subpoena in order to restrict the extent of the ordered disclosure and granted respondent 30 days in which to comply with the subpoena as modifed and thereby purge himself of the contempt (Pet. App. B, p. 18a). Respondent, however, chose to appeal and did not comply with the subpoena as modified.

under 21 U.S.C. 872(c), authorized respondent "to withhold the names and other identifying characteristics of persons who are the subjects of research conducted pursuant to and in conformity with [his] research project" (Pet. App. A, p. 6a, n. 5). The Secretary's regulations authorizing nondisclosure were adopted the following month. 37 Fed. Reg. 26800; 21 C.F.R. 130.44(g). The New York Court of Appeals subsequently reversed the order of the intermediate appellate court, vacated respondent's adjudication of contempt, and granted respondent's motion to quash the subpoena (Pet. App. A).[3]

DISCUSSION

Petitioner contends that Section 408 of the 1972 Act, 21 U.S.C. (1970 ed., Supp. II) 1175, impliedly revoked the authority of the Attorney General and the Secretary of Health, Education, and Welfare under 21 U.S.C. 872(c) and 42 U.S.C. 242a(a), respectively, to authorize nondisclosure of methadone maintenance treatment program records. In our view, the New York Court of Appeals

---

[3]In the Court of Appeals, respondent asserted the separate authorizations of the Attorney General and the Secretary as grounds for quashing the subpoena and vacating the contempt judgment. Petitioner argued in response only that the 1972 Act had revoked the authority of the Attorney General and the Secretary to authorize nondisclosure, an argument the court rejected. Petitioner did not contend that those authorizations, even if valid, would not be grounds for vacating the prior contempt judgment; the court of appeals therefore had no occasion to consider that question. In any event, we believe those authorizations did bar execution of respondent's sentence; that sentence was apparently intended to be coercive (see note 2, *supra*) and therefore part of a proceeding to compel respondent to identify his patients; any such proceeding was barred by 21 U.S.C. 872(c) and 42 U.S.C. 242a(a) once the Attorney General and the Secretary had acted.

correctly rejected this argument and there is no cause for further review of this issue.

Petitioner's contention is based upon a fundamental misunderstanding of the purpose of the 1972 Act's non-disclosure provisions. As we have explained above (pp. 3-4, *supra*), Section 408 of that Act was intended to enhance—not diminish—the confidentiality of patient records . The central purpose of that provision was to remove from the directors of drug abuse prevention programs their previous authority to release patient records at will. That purpose, and the language used by Congress to effect it, are entirely harmonious with the authority earlier granted to the Attorney General and the Secretary to authorize program directors to refuse production of patient records sought by subpoena or other legal process.

Thus, reading the 1970 and 1972 Acts together, a methadone maintenance treatment program director is not empowered even to comply with a subpoena for production of patient records until a court has authorized him to do so, and, under the Secretary's regulations, the most a court can do under such circumstances is to *authorize* voluntary compliance, for 42 U.S.C. 242a(a) bars the courts from *ordering* involuntary compliance. The plain language of these statutes does not seem reasonably subject to any other construction.

Moreover, this reading of the 1970 and 1972 Acts has been the consistent interpretation of those provisions by the Special Action Office for Drug Abuse Prevention, which was established by the 1972 Act to "provide overall planning and policy and establish objectives and priorities for all Federal drug abuse prevention functions" (21 U.S.C. (1970 ed., Supp. II) 1131(a)). See 21 C.F.R.

401.61 and 401.62.[4] It has also been the understanding of the Secretary, whose regulations authorizing nondisclosure under the 1970 Act were proposed and adopted after passage of the 1972 Act, and of the Attorney General, whose nondisclosure authorization to respondent also was issued after the 1972 Act became effective. This Court has often noted that "[w]hen faced with a problem of statutory construction, * * * great deference [is owed] to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 380 U.S. 1, 16. Thus even if the pertinent statutory language was less clear than it in fact is, the position taken jointly by the Special Action Office, the Secretary, and the Attorney General should be sustained.

Furthermore, petitioner's argument that the 1972 Act effected a repeal by implication—an argument traditionally disfavored by the courts (see, *e.g., United States* v. *Borden Co.,* 308 U.S. 188, 198-199)—has no basis in the legislative history. Congress at no point intimated an intention of revoking the authority it had granted to the Attorney General and the Secretary only two years earlier. See 21 C.F.R. 401.62. To the contrary, in discussing Section 408 of the 1972 Act, the provision relied upon by petitioner, the Conference Committee emphasized that the purpose of that provision was to assure "[e]very patient and former patient * * * that his right to privacy will be protected." H. Rep. No. 92-920, 92d Cong., 2d Sess., p. 33. A repeal of the Attorney General's and the Secretary's powers to authorize nondisclosure would of course have been incompatible with that purpose and was not intended by Congress.

---

[4]On September 24, 1973, those provisions were redesignated 21 C.F.R. 1401.61 and 1401.62 (38 Fed. Reg. 26611); they were subsequently republished on December 6, 1973 (38 Fed. Reg. 33744).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

KEITH A. JONES,
Assistant to the Solicitor General.

DECEMBER 1973.

DOJ-1973-12